IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.2309 OF 2000

The Board of Trustees of the Port
of Mumbai ..Petitioner.

Vs.

Shri. Ambika Prasad Mishra & anr. ..Respondents.

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Mr. P. Ramaswamy i/b Mulla & Mulla & Craigie Blunt & Caroe for the Petitioner.

Mr. Jaiprakash Sawant for Respondent No.1.

...

CORAM : DR.D.Y.CHANDRACHUD, J.

2nd February, 2005.

ORAL JUDGMENT :

Leave to amend.

1. The Presiding Officer of the Central Government Industrial Tribunal held by an award dated 18th May, 1999 that the enquiry that was conducted against the First Respondent stood vitiated due to

a failure to comply with the principles of natural justice. The findings of the Enquiry Officer have been held to be perverse. The action of the Port Trust in reducing the pay of the First Respondent by four stages has been held not to be justified and the reference under Section 10 of the Industrial Disputes Act, 1947 stands answered accordingly.

2. The First Respondent was working in the year 1991 as a Depot Superintendent in the Stores Department of Mumbai Port Trust and was attached to the stationary, uniforms and steel sections. The Port Trust had to store a huge quantity of coal in order to run its steam engines on Port Trust Railway lines. The steam engines were discontinued in 1990 and about 800 M.T. of coal was lying unused in the Loco Shed at Wadala. In August 1989, a proposal was submitted to the Chairman of the Board of Trustees by the Chief Engineer, Deputy Conservator, Chief Mechanical Engineer, Controller of Stores and the Additional Chief Accounts Officer to shift the steam coal to an alternative site viz. the Wagon Repair shop, Grain Depot and the coal

powder mixed with earth and stone to the Wadala incinerator. The proposal was approved by the Chairman on 28th August, 1989. It is alleged that the First Respondent initiated action for disposing of 200 M.T. of steam coal through a limited tender in November, 1989 contrary to the orders of the Chairman and that he accordingly submitted a note on 8th November, 1989. It is alleged that the First Respondent submitted that in accordance with the instructions of the Deputy Controller of Stores to another employee of the Port Trust, dealers in coal and coke from Sewri were taken to the coal shed at Wadala with a view to ascertain the value of the material lying there. It is further alleged that the First Respondent submitted a note on 15th November, 1989 to the Controller of Stores to the effect that keeping in view the condition of the material, a rate of Rs.128/- per metric ton plus 8% sales tax offered by a particular dealer was reasonable. It is alleged that the First Respondent did not follow the office procedure of keeping a record of having obtained acknowledgements for tender documents. On this note of the First Respondent, it is alleged that

200 MT of steam coal came to be disposed of though the First Respondent was not concerned with the Disposal Department.

3. A charge sheet was issued on 28th April, 1993 by the Controller of Stores to the First Respondent by which a departmental enquiry was convened. The articles of charge that were framed against the First Respondent were broadly thus ;

(i) That the First Respondent had failed to main absolute integrity and devotion to duty; in that though under the approval granted by the Chairman of the Port Trust on 26th August, 1989, steam coal was to be shifted to an alternative site, the First Respondent disposed of 200 MT through limited tenders in violation of Regulation 3(1) of the Bombay Port Trust Employees (Conduct) Regulations, 1975;

(ii) That the First Respondent submitted a note on 8th November, 1989 recording that in accordance with the instructions of the Deputy

Controller to another employee, dealers were taken to the shed at Wadala with a view to ascertain the value of the material. However, in a statement before the Assistant Chief Vigilance Officer, the First Respondent confirmed that he had never visited the site either while submitting his note to the Controller or after completing the delivery of the material. It was alleged that the First Respondent had furnished incorrect information and had accordingly violated Regulation 3(1) of the Employees (Conduct) Regulations;

(iii) The First Respondent had submitted a note recording that the rate of Rs.128/- per metric ton plus sales tax was reasonable though he had not visited the site to see the quality of the material, thereby violating Regulation 3(1); and

(iv) The First Respondent had not followed the procedure of keeping a record of having obtained acknowledgments from tenderers to whom tender documents for the disposal of coal

through limited tenders had been dispatched or delivered. Some of the dealers were not reputed dealers and an enquiry in the market showed that their whereabouts could not be traced.

4. On these charges a departmental enquiry was held. The First Respondent filed his written statement on 25th March, 1993. Evidence was adduced in the course of the enquiry. Ultimately, the disciplinary proceedings resulted in an order of the disciplinary authority reducing the pay of the First Respondent by four stages from Rs.4,940/- to Rs.4,340/- in the time scale of pay attached to the post of Depot Superintendent for a period of four years. The order of the disciplinary authority directed that the First Respondent will not earn any increment during the period of reduction and that upon the expiry of the period, the reduction will not have the effect of postponing his future increments of pay. An appeal was preferred by the First Respondent which was rejected by the appropriate authority on 15th October, 1996.

5. A reference to adjudication under Section 10 of the Industrial Disputes Act, 1947 having been made by the appropriate government to the Central Government Industrial Tribunal, this has resulted in the impugned award dated 18th May, 1999. The Presiding Officer of the Industrial Tribunal has held that the charge sheet which was framed against the First Respondent was for a violation of Regulation 3(1) under which every employee is required at all times to maintain absolute integrity and devotion to duty. The Industrial Tribunal relied upon a judgment of a learned Single Judge of this Court in Abdulla A. Latifshah v. The Bombay Port Trust (1992 II LLJ 226) wherein it was held that where misconduct when proved entails penal consequences, it is necessary for an employer to specify the misconduct and define it with precision and accuracy. The Learned Single Judge held that Regulation 3(1) provides only desirable characteristics which a public servant must possess and that a charge of misconduct could not be sustained with reference thereto. The second finding of the Industrial Tribunal was that the

First Respondent had sought a disclosure of the disciplinary proceedings held against the Deputy Controller of Stores, Mr. Hardi and that copies of those proceedings were not served to him. Hence, there was a breach of the principles of natural justice. The Industrial Court held that under Regulation 12(18) of the Mumbai Port Trust Employees (Classification, Control and Appeal) Regulations, 1976 the enquiry officer was under a duty to examine the workman generally for explaining the circumstances appearing against him in the evidence since the employee had not stepped into the witness box. The enquiry officer having failed to do this, the Industrial Tribunal has held that there was a breach of the principles of natural justice. Finally, in a brief finding in paragraph 12 of the impugned award the Industrial Tribunal held that the analysis which was carried out by the enquiry officer in respect of the evidence of witnesses was not proper and that he had "just relied" upon their testimony though that testimony revealed that the workman had acted according to the directions of his superiors.

6. An opportunity was thereafter given to the Petitioner to lead evidence to sustain the charge of misconduct. The management however, did not avail of that opportunity upon which, by its Part II award dated 29th November, 1999 the Industrial Tribunal held that the action of the management was not justified and that the arrears of pay would be liable to be refunded to the First Respondent as if his pay was not reduced by four stages.

7. The essential question upon which the outcome of these proceedings would turn is whether the Industrial Tribunal was justified in coming to the conclusion that there was a breach of the principles of natural justice for the three reasons that have weighed with the Tribunal. In assailing the findings of the Industrial Tribunal, Counsel appearing on behalf of the Petitioner urged that the judgment of the learned Single Judge of this Court, which was relied upon while construing the provisions of Regulation 3(1) of the Conduct Regulations was reversed by a Division Bench of this Court. Secondly, in so far as the disciplinary enquiry against the Deputy Controller

of Stores was concerned, the Port Trust was not relying upon those enquiry proceedings. The case of the First Respondent was that he had acted on the instructions of his superiors and this was something which was required to be proved by him in his defence. The proceedings of the enquiry against Mr.Hardi would only show that the Deputy Controller of Stores was also proceeded with. However, the proceedings in relation to the Deputy Controller of Stores had no relevance at all to the proceedings against the First Respondent and therefore, the demand for production was rightly refused. Thirdly, it was urged that in the present case the First Respondent was represented by a defence representative who was himself a member of the trade union. The First Respondent had chosen not to adduce any evidence. The findings of the enquiry officer cannot be held to be vitiated because the enquiry officer had not questioned the First Respondent generally with respect to the circumstances in the evidence against him. Reliance was placed on the judgment of a Division Bench of this Court in Chandrakant Damodar Kale v. Nagpur Improvement Trust (1998 I CLR 319).

8. On the other hand, on behalf of the First Respondent it was submitted that though the judgment of the learned Single Judge which was relied upon by the Industrial Tribunal was set aside by the Division Bench, the learned Single Judge has in fact followed the decision of the Supreme Court in A. L. Kalra v. The Project & Equipment Corporation of India Ltd. (1984 Lab.I.C. 961) and that apart from the judgment of the learned Single Judge, the award of the Industrial Tribunal can be sustained with reference to the decision of the Supreme Court. In so far as the second submission is concerned, it was urged that the disciplinary proceedings in relation to the Deputy Controller of Stores were relevant. Finally, in so far as the third submission was concerned, counsel relied upon a decision of the Supreme Court in Ministry of Finance v. S.B. Ramesh (1998 I CLR 659) in supporting the findings of the Tribunal. These rival submissions can now be considered.

9. In Abdulla A. Latifshah v. The Bombay Port

Trust (Writ Petition 2325 of 1988) H.H. Kantharia, J. in a judgment delivered on 1st August, 1990 held, following a decision of the Supreme Court in A.K. Kalra's case (supra) that a charge of misconduct could not be sustained by the Mumbai Port Trust with reference to the provisions of Regulation 3(1) of the Bombay Port Trust Employees (Conduct) Regulations, 1976. Regulation 3(1), it must be noted, provides that every employee shall at all times maintain absolute integrity and devotion to duty. The Conduct regulations were amended on 5th June, 1990. In addition to Regulation 3(1) clause (1A) came to be inserted in the Regulations as amended. Some of the material provisions of clause (1A) are as follows :

"(1A) No employee shall -

(i) act in a manner prejudicial to the interest of the port;

(iii) neglect work or show negligence in the performance of work including slowing down of work;

(iv) abet, connive at or attempt or commit theft, fraud or dishonesty in connection with Port Trust work or property;

(vi) act in insubordination or disobedience, whether alone or in combination with

others, of any lawful or reasonable order of a superior;

(xii) fail to observe rules or regulations;"

10. The decision of the learned Single Judge in Abdulla A. Latifshah's case was reversed by a Division Bench of this Court on 2nd December, 1993 in Appeal 941 of 1990 (arising out of Writ Petition 2325 of 1988). The observations of the Division Bench while setting aside the judgment of the learned Single Judge were as follows :

> "Learned counsel appearing on behalf of the appellants, submitted that the decision of the trial Judge suffers from serious infirmity and the principles laid down are entirely violative of well settled principles laid down by catena of decisions of this Court and the Supreme Court. There is considerable merit in the submission of the learned counsel and after close perusal of the judgment, we are unable to share either the reasoning or the conclusion recorded by the trial Judge and, it is, therefore, necessary to set aside the judgment."

11. Therefore, as a matter of fact this Court must proceed on the basis that the judgment of the learned Single Judge that was relied upon by the Industrial Tribunal in the present case does not hold the field. Be that as it may, it would be

necessary to consider the submission which has been urged on behalf of the First Respondent that the view which has been taken by the Industrial Tribunal is supported by the decision of the Supreme Court in A.L. Kalra v. The Project & Equipment Corporation of India Ltd. (1984 Lab I.C. 961) and it is to that issue that the Court must now turn.

12. In Kalra's case the employee was on probation as a Deputy Finance Manager in the Corporation and had applied for and obtained an advance for purchasing a plot of land and another advance for the purchase of a new motorcycle. Under the terms of the agreement, the amount which was drawn as advance was required to be used for the purpose of the loan and the employee was required to produce the sale deed for verification, failing which the whole amount was liable to be refunded. The appellant having neither utilised the advance, nor refunded the amount his salary as a whole was withheld for the purposes of adjustment. In so far as the advance for a motorcycle was concerned, it was admitted that the appellant had purchased a

scooter instead of a motorcycle and had submitted documents. On these facts, articles of charge were framed against the appellant for a breach of Rules 4(1)((i) and (iii) of the Employees' (Conduct, Discipline and Appeal) Rules. Rule 4(1)(i) provided that every employee shall at all times maintain absolute integrity and Rule 4(1)(iii) provided that he shall do nothing which is unbecoming of a public servant. Rule 5 prescribed specific instances of misconduct. In the course of its judgment, the Supreme Court held as follows :

> "A general expectation of a certain decent behaviour in respect of employees keeping in view Corporation culture may be a moral or ethical expectation. Failure to keep to such high standard of moral, ethical or decorous behaviour befitting an officer of the company by itself cannot constitute misconduct unless the specific conduct falls in any of the enumerated misconduct in Rule 5. Any attempt to telescope Rule 4 into Rule 5 must be looked upon with apprehension because Rule 4 is vague and of a general nature and what is unbecoming of a public servant may vary with individuals and expose employees to vagaries of subjective evaluation. What in a given context would constitute conduct unbecoming of a public servant to be treated as misconduct would expose a grey area not amenable to objective evaluation. Where misconduct when proved entails penal consequences, it is obligatory on the employer to specify and if necessary define it with precision and accuracy so that any ex post facto interpretation of some

> incident may not be camouflaged as misconduct.
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> .....In short it cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant standing order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty'. Rule 4 styled as 'General' specifies a norm of behaviour but does not specify that its violation will constitute misconduct. In Rule 5, it is nowhere stated that anything violative of Rule 4 would be per se a misconduct in any of the sub-clauses of Rule 5 which specifies misconduct. It would therefore appear that even if the facts alleged in the two heads of charges are accepted as wholly proved, yet that would not constitute misconduct as prescribed in the rule and no penalty can be imposed for such conduct."

13. In so far as the articles of charge were concerned, the Supreme Court held that there was no evidence which would permit an inference that the House Building Advance was utilized for a purpose other than that for which it was granted. Hence, the Court was of the view that no question of integrity arose. The Supreme Court held that it was not possible to accept as to how an advance which was not refunded in time would result in conduct unbecoming of a public servant when it was recovered by withholding the salary of the officer.

The first head of the charge was, therefore, held to be an eye-wash. The enquiry officer had not said anything as to how the uncontroverted facts constituted a conduct unbecoming of a public servant or his failure to maintain absolute integrity. In so far as the second charge was concerned, the Supreme Court held that there was absolutely no finding by the enquiry officer of misconduct on this ground and on the contrary the enquiry officer was satisfied that the delay in submitting documents relating to the purchase of a scooter instead of a motor cycle should not have been visited with a drastic punishment of stoppage of salary altogether.

14. In considering the submissions which have been urged on behalf of the First Respondent on the basis of the decision in A.L. Kalra's case, it would be necessary to advert to several decisions of the Supreme Court on the subject as well. In S. Govinda Menon v. Union of India (AIR 1967 SC 1274) the Commissioner of Hindu Religious and Charitable Endowments was sought to be proceeded against by the government inter alia on the charge that while

being employed in government service as a member of the Board of Revenue and as Commissioner he had issued sanctions for granting leases of forest lands belonging to Devaswoms under his control in disregard of the provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951 and the rules framed thereunder. Several acts of misconduct were alleged to have been committed by him in that connection. The submission which was urged before the Supreme Court was that the Commissioner was acting in a quasi-judicial capacity in sanctioning leases and that his orders unless vacated were final and could not be questioned through disciplinary proceedings. The charge against the officer was that by sanctioning the leases he had committed an act of misconduct under Rule 3 of All India Service (Conduct) Rule, 1954 which enjoins every member of the service to maintain absolute integrity in all official matters. The Supreme Court held thus :

> "In other words, if the act or omission is such as to reflect on the reputation of the officer for his integrity or good faith or devotion to duty, there is no reason why disciplinary proceedings should not be taken against him for that act or omission even though the act or omission relates to an activity in regard to

> which there is no actual master and servant relationship. To put it differently, the test is not whether the act or omission was committed by the appellant in the course of the discharge of his duties as servant of the Government. The test is whether the act or omission has some reasonable connection with the nature and condition of his service or whether the act or omission has cast any reflection upon the reputation of the member of the Service for integrity or devotion to duty as a public servant. We are of the opinion that even if the appellant was not subject to the administrative control of the Government when he was functioning as Commissioner under the Act and was not the servant of the Government subject to its orders at the relevant time, his act or omission as Commissioner could form the subject-matter of disciplinary proceedings provided the act or omission would reflect upon his reputation for integrity or devotion to duty as a member of the Service."

15. The next decision of the Supreme Court that would be material for considering the issues in the present case is the decision of a Bench of three Learned Judges of the Supreme Court in Union of India v. K.K. Dhawan (AIR 1993 SC 1478). In that case a disciplinary proceeding was convened against an income tax officer in respect of his conduct in completing certain assessments in an irregular manner, in undue haste and with a view to confer undue favours upon certain assessees and it was alleged that in doing so the employee had failed to

maintain absolute integrity and devotion to duty; thereby exhibiting conduct unbecoming of a government servant and violating the provisions of Rules 3(1)(i), 3(1)(ii) and 3(1)(iii) of the Central Civil Services (Conduct) Rules, 1964. Rule 3(i) of the Central Civil Services (Conduct) Rules, 1964 which forms the subject matter of the decision reads thus :

> "Rule 3(i) : Every government servant shall at all time -
>
> (i) maintain absolute integrity;
> (ii) maintain devotion to duty; and
> (iii) do nothing which is unbecoming of a government servant."

16. The Supreme Court placed reliance on the earlier decision in S.Govinda Menon's case (supra) and held that the articles of charge clearly mentioned that nine assessments were completed in an irregular manner, in undue haste and apparently with a view to conferring undue favours upon the assessees concerned. The Court held that disciplinary proceedings could be initiated against a government servant even with reference to the quasi-judicial powers provided :

> "i) The act or omission is such as to reflect on the reputation of the government servant for his integrity or good faith or devotion to duty, or
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> ii) there is prima facie material manifesting recklessness or misconduct in the discharge of the official duty, or
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> iii) the officer had failed to act honestly or in good faith or had omitted to observe the prescribed conditions which are essential for the exercise of statutory power."

The expression 'even' would indicate that the government has the power to initiate disciplinary proceedings in regard to misconduct committed in the exercise of powers which are of an administrative nature as well as of a quasi judicial nature. In the case of a government servant exercising quasi judicial powers, among the conditions that the Court imposes are that the act or omission must be such as to reflect on the reputation of the government servant for his integrity, good faith or devotion to duty.

17. The third decision to which a reference has to be made is the judgment of two Learned Judges in Secretary to Government v. A.C.J. Britto ((1997)

3 SCC 387) where the judgment in Kalra's case was adverted to. Disciplinary proceedings were held against a Sub-inspector of police for not complying with an order of a superior officer to submit himself for a medical examination regarding his fitness to return to duty after a long absence. The employee contended that the absence of any rule treating non-compliance with an order of a superior officer or non-appearance before a Medical Board as an act of misconduct would mean that no disciplinary proceedings should have initiated against him. The submission was rejected by the Supreme Court and the judgment in A.L. Kalra v. The Project & Equipment Corporation of India Ltd. (supra) came to be explained. The Supreme Court held thus :

> "This Court in that case has not laid down as a general principle that if an act is not specified by rules to be a misconduct then it cannot be regarded as such and an employee cannot be punished for committing such an act."

18. These decisions of the Supreme Court would demonstrate that Service Rules similar to Regulation 3(1) of the Conduct Regulations of 1976

of the Mumbai Port Trust have been the subject matter of decision by the Supreme Court in a line of cases commencing with the decision in Govinda Menon's case. A breach of a service rule which provides that every employee shall at all times maintain absolute integrity and devotion to duty has been held to sustain a charge of misconduct in the aforesaid judgments. The decision in A.L. Kalra's case would show that the enquiry in that case was really an eye-wash, as the Supreme Court noted in the course of its judgment. The advance which had been taken for a motorcycle had in fact been duly utilized though for a scooter and in so far as the House Building Advance was concerned, it had been adjusted by making deductions by withholding the salary of the employee. In these circumstances, the Supreme Court held that it passed comprehension as to how a question of integrity unbecoming of a public servant arose in the matter. The position in law which emerges from the decisions of the Supreme Court, therefore, is that when the employer proceeds against an employee on the ground that his conduct is in breach of the obligation imposed by the Conduct Regulations to

maintain absolute integrity and devotion to duty, the charge sheet must spell out, with precision, the nature of the allegations on the basis of which it is alleged that the employee has failed to maintain absolute integrity and devotion to day. As the Supreme Court held in Kalra's case, the employer is obliged to specify and, if necessary, define the act of misconduct with precision and accuracy so that an ex post facto interpretation of some incident may not be camouflaged as misconduct.

19. In the present case, the charge sheet that was issued to the First Respondent spelt out with precision the nature of the charges and the manner in which the employee was alleged to have violated Regulation 3(1). The charge was that (i) In breach of the approval granted by the Chairman of the Board to the shifting of a stock of steam coal to an alternative site under the control of the Board, the First Respondent had initiated the process of disposing of a stock of 200 MT by inviting limited tenders; (ii) The First Respondent, contrary to his own note dated 8th November, 1989, had neither visited the site either at the time of his

submission or after completing delivery; (iii) In preparing a note to the effect that the rate which had been offered by certain dealers was reasonable the First Respondent had not visited the site to verify the quality of the material; and (iv) the First Respondent had not followed the requisite procedure for the purpose of completing the limited tender enquiry. The charges were, therefore, not vague, but were specified with precision so as to enable the employee to understand what the nature of the allegation against him was. The First Respondent submitted his reply and his case was that he acted in accordance with the instructions of his superiors. Therefore, it is impossible to accept the finding of the Industrial Tribunal that the charge sheet was vague or that the disciplinary enquiry was vitiated on that ground.

20. In so far as the second finding is concerned, the First Respondent called for the production of copies of enquiry proceedings that were held against Mr. S.R. Hardi who was the Deputy Controller of Stores. Regulation 12(12) of the Employees' (Classification, Control and Appeal)

Regulations, 1976 of the Petitioner provides that the enquiring authority shall, on receipt of a notice for discovery or production of documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept, with a requisition for the production of the documents by such date as may be specified in the requisition. Under the proviso thereto, the enquiring authority is entitled, for reasons to be recorded in writing, to refuse such documents which in its opinion, are not relevant to the case. The defence of the First Respondent in his reply to the charge sheet of 25th May, 1993 was that he had acted in accordance with the instructions of his superior and that the Deputy Controller of Stores was proceeded with departmentally on similar charges. The First Respondent was clearly not entitled to copies of the disciplinary proceedings in Hardi's case. If the case of the First Respondent was that he acted in accordance with the instructions of his superior, the burden was on him to establish that defence by seeking a summons to Mr. Hardi or the concerned officer. Neither has the Industrial Tribunal indicated as to how the non

production of those documents was a matter of prejudice nor for that matter has the First Respondent been able to establish before the Court that any prejudice has been caused to his case by the non-production of the documents. The finding of the Industrial Court on this ground is clearly unsustainable.

21. In so far as the third finding is concerned Regulation 12(18) of the Employees (Classification, Control and Appeal) Regulations, 1976 provides that the enquiring authority may, after the employee closes his case, and shall, if the employee has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the employee to explain any circumstances appearing in the evidence against him. The question which arises for consideration is as to whether the disciplinary enquiry must be held to be vitiated in every case on account of the omission on the part of the enquiry officer to question an employee where the employee has not adduced evidence. It must be noticed that sub regulation (18) confers a discretion upon the

enquiring officer to examine the employee after the employee closes his case and uses the expression 'shall' when it requires the enquiring authority to question the employee on the circumstances against him where he has not examined himself. However, in my view, it would not be correct to hold that the disciplinary enquiry would stand vitiated in every case upon an omission of the enquiring authority to do so. In the present case, for instance, the employee was defended by a defence representative who was himself a member of the trade union. The First Respondent took a conscious decision, one would presume, not to step into the witness box, though he was not bound to do so. Having chosen not to adduce any evidence on his own behalf, the employee cannot then be heard to contend that an omission on the part of the enquiring authority to examine him with reference to the circumstances appearing against him in the evidence would vitiate the enquiry. There is no proof of prejudice. A judgment of a Division Bench in Chandrakant Damodar Kale v. Nagpur Improvement Trust (1998 I CLR 319) may be adverted to in this connection. In that case, the enquiring officer failed to put to the

petitioner circumstances arising out of a certain piece of evidence as required in Rule 8(20) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 which was pari materia. Adverting to the decisions of the Supreme Court in the context of Section 352 of the Criminal Procedure Code of 1898 the Division Bench held that an omission to question the accused on circumstances arising from the evidence have been held not to vitiate even a criminal trial ipso facto since the prejudice occasioned by such defect must be established by the accused. The judgment of the Division Bench is a clear answer to the submission which has been urged on behalf of the First Respondent. The First Respondent has neither in the Industrial Court nor before this Court urged any submission that would indicate any element of prejudice due to the omission of the enquiry officer to question him with reference to the circumstances appearing against him. Counsel for the First Respondent relied upon a decision of the Supreme Court in Ministry of Finance v. S.B. Ramesh (1998 I CLR 659). Reliance was sought to be placed on the Head Note in the issue of the Current Labour Reports,

but it is trite experience that Head Notes can some times be misleading. This is one of those cases. In the case before the Supreme Court, an order of the Central Administrative Tribunal was challenged. Before dealing with the issues which arose, the Supreme Court observed that despite the passage of nearly three years after leave was granted, government had not taken any steps to complete the paper books with the result that only the judgment of the Tribunal, apart from the Special Leave Petition and the counter affidavit filed before the Tribunal were available on the record. No other documents, the Supreme Court noted, had been produced. The Supreme Court adverted to the decision of the Central Administrative Tribunal in extenso in paragraphs 13 and 14. The charge against the officer in that case was that he had contracted a second marriage while his first wife was alive and though the first marriage had not been dissolved. The Tribunal in dealing with this charge of misconduct held inter alia that though the enquiry was set down ex parte, the employee should have been furnished with an opportunity to explain the circumstances appearing against him in

the evidence. This was therefore (as contradistinguished from the present case) a case where the employee had been proceeded against ex parte and had therefore not defended himself in the course of the enquiry. The Tribunal did not rest its decision on this aspect alone since it also observed that the enquiry officer had marked several documents in evidence, though only one of them was proved and only one statement was alleged to have been recorded in the presence of the employee. This was held to be a serious error on the part of the Enquiry Officer. The Tribunal held that documents which were not duly proved in accordance with law should not have been received in evidence. The enquiry officer and the disciplinary authority relied upon certain statements which were faulted by the Tribunal. The person who made the statement was not examined in the enquiry. The authenticity of the documents which were sought to be relied upon was not established. In this factual background, in paragraph 15 of its judgment, the Supreme Court held thus :

"On a careful perusal of the above findings of

> the Tribunal in the light of the materials placed before it, we do not think that there is any case for interference, particularly in the absence of full materials made available before us in spite of opportunity given to the appellants. On the facts of this case, we are of the view that the departmental enquiry conducted in this case is totally unsatisfactory and without observing the minimum required procedure for proving the charge. The Tribunal was, therefore, justified in rendering the findings as above and setting aside the order impugned before it."

22. The facts of the aforesaid case have been adverted to in some detail. The findings of the Supreme Court clearly show that it was on a totality of all these facts and circumstances that it was held that no case for interference with the order of the Tribunal was warranted.

23. In the light of the aforesaid discussion, therefore, the finding of the Industrial Tribunal of a breach of the principles of natural justice is hence required to be set aside.

24. The Industrial Tribunal made a brief reference to the findings which have been arrived at by the enquiry officer and held that the analysis by the enquiry officer was not proper. The Tribunal has

held in one fell swoop that the testimony of the witnesses reveals that the workman had acted in accordance with the directions of superiors. In my view, the Tribunal in determining whether the findings that were arrived at by the enquiry officer were perverse, ought to have considered the matter in greater detail. The Tribunal under the provisions of Section 11A of the Industrial Disputes Act, 1947 exercises powers which are supervisory in nature and would not be justified in setting aside findings which are borne out by the evidence on the record. In these circumstances, therefore, the impugned award of the Industrial Tribunal dated 18th May, 1999 suffers from legal perversity and must, therefore, be quashed and set aside. The Tribunal, it must be noted, furnished an opportunity to the First Respondent to lead evidence. That opportunity was not availed of by the First Respondent. Since the First Respondent has failed to avail of an opportunity to lead evidence, it would now not be permissible for the First Respondent do to so. The Tribunal having principally applied its mind to the question of a violation of the principles of natural justice

quashed and set aside the findings of the enquiry officer. As already noted above, the findings on the question as to whether the findings of the enquiry are perverse are perfunctory and would merit a fresh consideration by the Tribunal.

25. In the circumstances, the impugned awards dated 18th May, 1999 and 29th November, 1999 are quashed and set aside. The matter shall stand remitted back to the Industrial Tribunal for considering as to whether the findings which have been arrived at in the course of the enquiry suffer from any perversity and on the question as to whether the punishment that was imposed upon the First Respondent was shockingly disproportionate. The Petitioner shall not be entitled to lead any further evidence in the matter before the Tribunal. The parties are directed to appear before the Tribunal for directions on 7th March, 2005 on which date the Tribunal shall issue necessary directions for an expeditious disposal of the reference. The Court has been informed that based on the impugned award of the Tribunal the First Respondent moved the Labour Court under Section 33-C(2) of the

Industrial Disputes Act, 1947 for an order for the repayment of an amount of Rs.71,769.03 which was withheld by the Petitioner in pursuance of the penalty which was imposed in the disciplinary proceedings. Since the disciplinary action had been set aside by the Tribunal, an order under Section 33-C(2) had to issue as a matter of course. Since the award of the Industrial Tribunal has been set aside by this judgment, the order under Section 33-C(2) shall stand quashed and set aside. The Tribunal is now requested to hear and dispose of the reference expeditiously in accordance with the observations contained in the present judgment.

26. The amount of recovery which has been made by the Board of Trustees in pursuance of the disciplinary proceedings is to the extent of Rs.71,769.03. Counsel appearing on behalf of the First Respondent submitted that the First Respondent has since retired from service and having regard to the circumstances of the case and his 30 years of service, it would be appropriate if the Board of Trustees of the Port of Mumbai considers the matter in an appropriate manner in

the interests of justice. Mr. Ramaswamy, learned counsel appearing on behalf of the Petitioner stated that a proposal has already been placed for consideration of the Board and that if it is approved the dispute in relation to the First Respondent may be resolved. The statement made by the learned counsel is accepted without expressing any opinion on this aspect of the matter. The Petition is accordingly disposed of. No costs.